

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

CAROL K. TOBLER, *et al.*,

Plaintiffs,

v.

DEPUY ORTHOPAEDICS, INC., *et al.*,

Defendants.

Case No. 2:12-cv-01167-LDG (RJJ)

**ORDER**

The plaintiffs, Carol and Fenton Tobler, brought this action in state court alleging numerous claims against Defendants DePuy Orthopaedics, Inc., DePuy International Limited, Johnson & Johnson, Johnson & Johnson Services, Inc., Johnson & Johnson International and Precision Instruments, Inc. The Toblers' claims against the defendants all concern the implantation of a hip implant manufactured by DePuy<sup>1</sup> into Carol. DePuy removed this action, expressly asserting that removal was appropriate as complete diversity existed among the properly joined parties and the amount in controversy exceeded \$75,000. In the removal, DePuy expressly acknowledged that the Toblers' complaint names Precision as a defendant, and alleges that Precision is a citizen of

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<sup>1</sup> In their complaint, the plaintiffs collectively refer to all defendants *except* Precision as DePuy. The Court will follow that convention in the present order.

1 Nevada. DePuy nevertheless asserted the Court should disregard Precision's citizenship  
2 because Precision was fraudulently joined as all state claims against Precision were  
3 preempted by federal law.

4 Subsequent to the removal, DePuy moved to stay (#9) this action pending transfer  
5 to MDL No. 2197 - *In re: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability*  
6 *Litigation*. On the same date, the plaintiffs moved to remand (#10). The plaintiffs  
7 subsequently moved for an expedited consideration of their motion to remand (#19).

8 Subsequent to the removal, though prior to the filing of the motions presently before  
9 the Court, the Judicial Panel on Multidistrict Litigation entered Conditional Transfer Order  
10 138 identifying 14 actions from this District, including the present action, as involving  
11 questions of fact common to the Multidistrict Litigation ("MDL") proceeding in the Northern  
12 District of Ohio that is before the Honorable David A. Katz, MDL No. 2197, *In re DePuy*  
13 *Othtopaedics, Inc., ASR Hip Implant Products Liability Litigation*, 753 F. Supp. 2d 1378  
14 (J.P.M.L. 2010). The MDL was created in response to a number of lawsuits filed against  
15 DePuy after it initiated the voluntary recall of the hip implant. The Toblers have filed a  
16 Notice of Opposition to the Conditional Transfer Order and have formally moved to vacate  
17 it. A hearing is scheduled on September 20, 2012, before the Judicial Panel on Multidistrict  
18 Litigation on the Tobler's opposition to transfer, as well as the opposition of the plaintiffs in  
19 14 other District of Nevada actions conditionally transferred to MDL 2197.

20 A district court has discretionary power to stay proceedings in its own court. *Landis*  
21 *v. N.A. Co.*, 299 U.S. 248, 254-255 (1936); *see also Lockyer v. Mirant Corp.*, 398 F.3d  
22 1098, 1109 (9th Cir. 2005). "A trial court may, with propriety, find it is efficient for its own  
23 docket and the fairest course for the parties to enter a stay of an action before it, pending  
24 resolution of independent proceedings which bear upon the case." *Leyva v. Certified*  
25 *Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). "When considering a motion to  
26 stay, the district court should consider three factors: (1) potential prejudice to the non-

1 moving party; (2) hardship and inequity to the moving party if the action is not stayed; and  
2 (3) the judicial resources that would be saved by avoiding duplicative litigation if the cases  
3 are in fact consolidated.” *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal.  
4 1997).

5 The Court concludes that granting a stay in this case promotes judicial economy,  
6 avoids the risk of inconsistent judgments and results in minimal, if any, prejudice to the  
7 Toblers. A stay pending an MDL transfer order will avoid duplicative discovery and pretrial  
8 management efforts. The Toblers contest whether this case was properly removed under a  
9 theory of federal implied preemption. At the present time, a review of the dockets of the  
10 other District of Nevada actions that have been conditionally transferred to MDL 2197  
11 indicates that the issue of the applicability of implied preemption to claims against alleged  
12 distributors and sales representatives – DePuy’s basis for removal – is common to these  
13 cases. In addition, DePuy represents that the issue is already pending before Judge Katz  
14 in other cases. Granting a stay of proceedings pending transfer to MDL 2197 promotes  
15 judicial efficiency and consistent adjudication in cases like this one, “when the transferor  
16 court believes that a transfer order is likely and when the pending motions raise issues  
17 likely to be raised in other cases as well.” David F. Herr, *Annotated Manual for Complex*  
18 *Litig.* § 22.35 (2012); *see also Moore v. Wyeth-Ayerst Labs*, 236 F. Supp. 2d 509, 512 (D.  
19 Md. 2002) (granting a stay because “it furthers the goals of judicial economy and  
20 consistency”).

21 The Toblers have not shown that a stay of these proceedings, and the denial of their  
22 motion to remand without prejudice, would prejudice them. The Court may properly decide  
23 DePuy’s motion to stay prior to deciding the motion to remand because “[j]urisdiction is vital  
24 only if the court proposes to issue a judgment on the merits.” *Sinochem Int’l Co. Ltd. v.*  
25 *Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007). And while transfer to the MDL  
26 court will extinguish all prior motions pending in the transferor court at the time of transfer,

1 the Toblers can re-file their Motion to Remand upon transfer. "Allowing the transferee judge  
2 to rule on the motion to remand provides for consistent treatment of similar issues and may  
3 reduce the burden on litigants and the judiciary." *Moore*, 236 F. Supp. 2d at 511. Thus,  
4 assuming that the Toblers' opposition to transfer is denied and the transfer of this action to  
5 MDL 2197 becomes final, Judge Katz can address the Toblers' motion to remand and,  
6 given the similarities of the motion to remand in this case to similar motions filed in the  
7 other District of Nevada cases conditionally transferred, will be able to consider at once the  
8 issue as it is raised in each of the related actions from the District of Nevada. *In re Ivy*, 901  
9 F.2d 7, 9 (2d Cir. 1990) ("Once transferred, the jurisdictional objections can be heard and  
10 resolved by a single court and reviewed at the appellate level in due course. Consistency  
11 as well as economy is thus served."). Conversely, if this matter is not transferred to the  
12 MDL, the Toblers can renew their motion to remand.

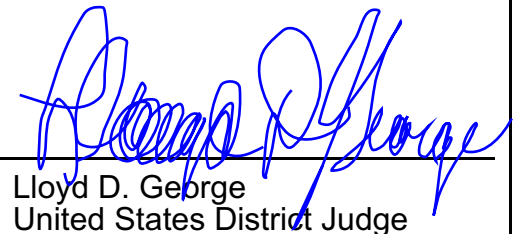
13 Therefore,

14 THE COURT **ORDERS** that Defendants' Motion to Stay (#9) is GRANTED pending  
15 the MDL court's transfer determination.

16 THE COURT FURTHER **ORDERS** that Plaintiffs' Motion to Remand (#10) is  
17 DENIED without prejudice.

18 THE COURT FURTHER **ORDERS** that Plaintiffs' Motion for Expedited  
19 Consideration of Motion to Remand (#19) is DENIED as moot.

20  
21 DATED this 17 day of August, 2012.

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23   
24 Lloyd D. George  
25 United States District Judge  
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